

**QUARTERLY ATTORNEY REPORT  
ENTERPRISE  
July 2004**

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**TO:** CRWCD ENTERPRISE BOARD OF DIRECTORS

**FROM:** PETER C. FLEMING, GENERAL COUNSEL  
JILL MCCONAUGHY, ASSOCIATE COUNSEL  
KIRSTIN MCMILLAN, STAFF COUNSEL

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Dear Directors:

This report identifies matters for potential discussion at the July 21, 2004, meeting of the River District's Enterprise. A separate Confidential Report (Attachment A to the General Report) addresses confidential matters. The information in this report is current as of July 8, 2004, and will be supplemented as necessary before or at the Board meeting.

**I. EXECUTIVE SESSION**

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(4)(a), (b) and (e):

- A. Pricing and Conditions for New Eagle River Water Marketing Supply.
- B. Elkhead Reservoir Enlargement - Property Acquisition Issues.

**II. WATER PROJECTS**

**A. Elkhead Reservoir Enlargement - Property Acquisition Issues.**

As Dan Birch reports, the Elkhead Reservoir Enlargement agreements are proceeding along well. A meeting is scheduled for the end of July with the Department of Interior solicitor to discuss the agreements, so we have not scheduled the agreements for final approval by the Board at this meeting. We are hopeful though that there will be very few changes, if any, to the agreements that result from the late-July meeting.

Dan has submitted a confidential memo to me and the Board regarding property acquisition issues that is included in your Board material. *We recommend that the Board discuss these issues in executive session.*

**B. River District Application for Wolford Mountain Reservoir Second Enlargement, Case No. 03CW302, Water Division 5.**

Pursuant to the Board's direction, we filed an application at the end of December for a conditional storage water right in the amount of 9,775 acre feet for the Wolford Mountain Reservoir Second Enlargement. A total of five statements of opposition were filed by the City and County of Denver, City of Colorado Springs Utilities, Grand Valley Water Users Association, Ute Water Conservancy District, and Orchard Mesa Irrigation District. We held an initial status conference on June 7 and plan to meet with the objectors to begin exploring their concerns. A major issue that needs to be resolved is the extent of Denver's participation in the enlargement, if any.

**C. River District's Application to Make Absolute the Wolford Mountain Reservoir First Enlargement, Case No. 03CW192, Water Division 5.**

We are pleased to report that on May 24, 2004, the Water Judge signed the Ruling of the Referee and Decree of the Water Court making the Wolford Mountain Reservoir First Enlargement water right absolute for all decreed purposes.

**D. Wolford Mountain Reservoir Hydro-Electric Project.**

In May, we submitted to FERC the Sixth Semi-Annual Progress Report under the Preliminary Permit for the Wolford Mountain Reservoir Hydro-Electric Project. In that Report, we notified FERC that the River District Board decided not to apply for another preliminary permit or a license at the present time. We indicated, however, that the River District would continue to examine the feasibility of the project and might apply for a license or another preliminary permit in the future. In addition, we advised FERC that the River District is investigating a possible enlargement of the storage capacity of Wolford Mountain Reservoir and indicated that we would like to initiate discussions with FERC staff in the near future to discuss the contemplated enlargement.

**E. River District/City of Colorado Springs Application for CSU Substitution Plan, Case No. 03CW320, Water Division 5, and Consolidated Cases No. 2782, 5016 & 5017, U.S. District Court.**

We filed a joint application with Colorado Springs Utilities ("CSU") at the end of December to adjudicate CSU's substitution plan, that will allow it to divert out-of-priority as against Green Mountain Reservoir and substitute releases from other West Slope sources, including an account the River District will maintain for CSU at Wolford Mountain Reservoir. A total of thirteen statements

of opposition were filed by Breckenridge, Vail Associates, Vail Summit Resorts, Denver, Aurora, Everist Materials, Grand Valley Water Users Association, Ute Water Conservancy District, Orchard Mesa Irrigation District, Northern Colorado Water Conservancy District, Northern's Municipal Subdistrict, Summit County, Colorado Water Conservation Board, and the U.S. Bureau of Reclamation. The first status conference is scheduled for July 26.

**F. Old Dillon Reservoir.**

We are working with Summit County on an Intergovernmental Agreement to establish a framework for the River District's participation in the enlargement of Old Dillon Reservoir. Dave Merritt's memo provides more details regarding the project and the contemplated IGA. *The Board may wish to approve the IGA in concept and/or delegate final approval of the IGA to the Water Supply Projects Committee.*

**G. Eagle Park Reservoir Co., Supplemental Homestake Reservoir Exchange with Aurora.**

The Agreement to implement the supplemental exchange involving the Eagle Park Reservoir Company and Aurora has been fully executed. The exchange will provide the reservoir company (of which the River District is a shareholder) with up to 500 acre feet of additional water to be released by Aurora from Homestake Reservoir or other suitable sources for use on the West Slope. The supplemental water will be available to the reservoir company only when the company has a positive credit balance of exchanges into Homestake Reservoir. In return, the reservoir company will exchange additional water into Homestake Reservoir to increase the physical supply for Aurora when the reservoir would otherwise be out-of-priority. A copy of the executed Agreement is included with your Board materials.

A few minor changes were made to the agreement after the Board's approval at the May 13, Special Joint Meeting in Ridgway. The changes made were:

1. In paragraph 4, a sentence was added to confirm the right of the reservoir company to extend the agreement for 25-year consecutive terms.
2. A typographical error (the word "a") was deleted from the last sentence of paragraph 9.
3. In paragraph 28, Aurora's acceptance of the Flattops Ranch Company water as a replacement source was made contingent on approval of the Flattops pending application in Case No. 03CW159, instead of being contingent on "all necessary approvals."

*Due to the changes made, we recommend that the Board ratify the Agreement as executed (see Attachment B).*

We will need to discuss with the Board an internal agreement with the reservoir company to pledge certain River District water resources to the operation of the exchange. We will provide the Board with more information and a recommendation on that topic at the October Board meeting.

#### **H. Pricing Structure for New Eagle River Supply.**

The River District will have an additional 125 acre-feet of Eagle River Supply to add to its water marketing program as a result of the 2004 Water Exchange Agreement with Aurora. River District staff believes the additional water will be equally as firm of a supply in the practical sense as our existing Eagle River Supply. However, it is important to note that the new supply will not be as firm in the legal sense because the new agreement with Aurora provides that the reservoir company can draw on the additional water only to the extent it has a positive “credit” balance of water exchanged into Homestake Reservoir.

Dave Merritt’s July 9, 2004, memorandum (included in your Board material) recommends a pricing structure for the new Eagle River Supply. *We recommend that the Board adopt the pricing structure for up to 30 acre feet of additional supply, so that the water can be incorporated into the water marketing program. We recommend that the remainder of the additional supply be reserved, pending the Board’s future discussion of its Enterprise activities, in accordance with the May 2004 Board Workshop. The Board may wish to discuss these issues further in executive session.*

### **III. OTHER MATTERS**

#### **A. Revisions to Water Marketing Policy and Water Supply Contract Form.**

*We propose that the Board authorize revisions to the Water Marketing Policy and Water Supply Contract to give all contractors the option of converting their payment option for long-term contracts from annual to upfront within three years of contract execution.*

The River District currently offers two payment options for long-term contracts: (1) annual payment with the ability to terminate each year; and (2) upfront payment with no ability to terminate. The upfront payment costs less per acre foot over the term of the contract. The River District offers governmental entities the option of converting to an upfront price equivalent within three years of contract execution upon a showing that they have taken the steps necessary to bind themselves to a multi-year financial obligation (because they will not be able to terminate the contract and will be required to pay annual O&M charges).

Because the River District has a policy of requiring contractors to execute a water supply contract before they file a water court application or get a water court decree, many contractors request an annual payment contract so that they can terminate it in the event that they do not obtain a water court decree and/or land use approvals that are necessary for their project. Other contractors choose to enter into an annual payment contract before they get a decree in order to secure scarce water supplies, such as the River District's Eagle River Supply, and preserve the ability to terminate in the event a decree is not entered. We have had several requests from contractors who enter into annual payment contracts to convert to the upfront price once they obtain a water rights decree. By converting to an upfront payment option, the contractor would pay less for the water over the long-run and forfeit his or her right to terminate the contract. The River District would benefit from this arrangement to the extent that it would receive the full payment of the up-front payment, plus it would retain any annual payments that were made prior to the conversion (in other words, no refund is provided, or deduction made from the upfront price, for annual payments already made).

*We recommend that the Board approve the proposed policy change for immediate implementation. If the Board does so, we will make any necessary changes to the Water Marketing Policy and Water Supply Contract and present those changes to the Board for ratification in October.*

Attachments:

- A. Confidential Report from P. Fleming, July 8, 2004 (attached as Attachment A to General Report)
- B. Eagle Park Reservoir Company/Aurora 2004 Water Exchange Agreement